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No. 08-441

In the Supreme Court of The United States

JACK GROSS,
Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Eighth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1/]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. More than half of AARP's nearly 40 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA) and the other federal employment discrimination laws that will be affected by the Court's decision in this case. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

In this case it is AARP's view that the Court need not and should not create a hierarchy among the federal work place civil rights laws - with one low evidentiary burden for Title VII mixed motive claims on the one hand and a higher burden for such claims arising under the ADEA and all other federal statutes applicable to work place discrimination claims on the other. Indeed, there are no compelling legal or policy reasons for doing so. Rather, a decision that the *same* standard is applicable to all such claims would simplify a proof paradigm about which there has been substantial confusion – much as this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), brought order to the chaos in the lower courts surrounding discrimination cases to

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[1/] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

which the *McDonnell Douglas*[2/] proof paradigm is applicable. AARP files this brief *amicus curiae* to urge the Court to hold justly that, like plaintiffs in Title VII cases, plaintiffs under the ADEA and the other federal workplace civil rights statutes need not provide direct evidence of discrimination in order to obtain a mixed motive jury instruction.

SUMMARY OF ARGUMENT

Since the substantive, antidiscrimination provisions of the ADEA are identical to those of Title VII, the Court should rely on its sound reasoning in *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003), based on the text of Title VII, to hold that mixed motive claims under Title VII and the ADEA are subject to the same proof standard. Like Title VII, neither the ADEA nor any of the other federal work place anti-discrimination statutes includes a heightened proof standard for mixed motive claims. As the Court pointed out in *Desert Palace*, a direct evidence requirement would be inconsistent with the usual preponderance of the evidence standard of proof in civil cases. The Court also explained in *Desert Palace* that the absence of a direct evidence requirement in the language of Title VII was particularly significant because Congress has been "unequivocal" when imposing heightened proof requirements in other circumstances. Further, the Civil Rights Act of 1991 (CRA), which amended Title VII to modify the result of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), but did not so amend the ADEA, does not even mention direct evidence. Additionally, the fact that the CRA did not similarly amend the ADEA is not a sufficient reason to continue to apply to ADEA mixed motive claims the direct evidence requirement articulated by Justice O'Connor in her concurring opinion in *Price Waterhouse*, a requirement that, as pointed out in

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[2/] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Petitioner's Brief at 53 and as discussed herein, was implicitly rejected by five justices in that case.

Moreover, this Court has pointedly declared that the ADEA and Title VII share the goal of eliminating the discriminatory work place and in pursuit of that elusive goal has concluded in other contexts that the failure of Congress to similarly amend these statutes does not bar construing them in similar fashion in order to achieve a just result. Thus, in the absence of any compelling legal or policy reasons to apply a different proof standard to mixed motive claims depending on which statute is involved, it would be unfair and unjust to do so.

ARGUMENT

I. THIS COURT'S SOUND REASONING IN *DESERT PALACE* BASED ON THE TEXT OF TITLE VII APPLIES EQUALLY TO THE IDENTICAL LANGUAGE OF THE ADEA.

Title VII of the Civil Rights Act of 1964 provides that it is an "unlawful employment practice for an employer ... to discriminate against any individual ..., *because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (a) (1) [emphasis added]. Twenty years ago in *Price Waterhouse*, a Title VII sex discrimination case in which there was no majority opinion, this Court concluded that if the plaintiff shows that both legitimate and illegitimate reasons motivated the employer's decision, she had proved that the decision was "because of" the illegitimate reason (in *Price Waterhouse*, the plaintiff's sex), but that the employer could avoid liability if it could prove it would have made the same decision in the absence of the illegitimate reason. 490 U.S. at 244.

As pointed out in *Desert Palace*, 539 U.S. at 93, the *Price Waterhouse* Court was "divided, however,

over the predicate question of when the burden of proof may be shifted to an employer to prove the affirmative defense." Justice Brennan, writing for a plurality of four justices concluded that the burden should shift when the "plaintiff proves that her gender played a *motivating* part in the employer's decision." *Price Waterhouse*, 490 U.S. at 258. Justice White and Justice O'Connor wrote separate opinions concurring in the judgment and concluding that the burden should shift if the plaintiff showed that the illegitimate consideration was a "substantial factor" in the employment decision. *Price Waterhouse*, 490 U.S. at 259 and 276. As *Desert Palace* makes clear, however, the *Price Waterhouse* plurality of four justices "did not 'suggest a limitation on the possible ways of proving that [gender] stereotyping played a motivating role in an employment decision.'" 539 U.S. at 93, quoting *Price Waterhouse*, 490 U.S. at 252-252. And while Justice White and Justice O'Connor agreed the plaintiff must show that the unlawful motive was a "substantial factor," of the six justices supporting the judgment only Justice O'Connor concluded that the plaintiff must make such a showing by direct evidence. Thus, the standard for shifting the burden of proof endorsed by five justices - the plurality plus Justice White - did not include a direct evidence requirement. It, therefore, appears that the court below, like many other courts, mistakenly concluded that the "holding" of *Price Waterhouse* is that in order to shift the burden of proof in a mixed motive case the plaintiff must show that an illegitimate consideration was a substantial factor in the employment decision by direct evidence.

The Civil Rights Act of 1991 (CRA) amended Title VII to clarify that a plaintiff in a mixed motive case may establish defendant's liability simply by proving that discrimination was a "motivating" factor; however, since the ADEA was not so amended, pursuant to *Price Waterhouse* an ADEA plaintiff must show that discrimination was either a "motivating" factor or a "substantial" factor, depending on which

Price Waterhouse opinion the trial court views as controlling. While a superficial reading suggests that these terms create different standards, in fact *Price Waterhouse* did not define either and in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), a First Amendment case, this Court rejected such a view by equating the two terms:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him.

Id. at 287. If, indeed, there is any difference between these formulations of *what* the plaintiff must prove, it should have no effect on *how* the plaintiff proves it, *i.e.*, whether it is by direct or circumstantial evidence.

Based in part on the text of the prohibitory language of Title VII and in part on the CRA amendments to Title VII two years after the *Price Waterhouse* decision, this Court held in *Desert Palace* that in a Title VII sex discrimination case the plaintiff need not present direct evidence of discrimination in order to have the jury instructed that if it finds that the employer's decision to terminate the plaintiff was motivated by both legitimate and illegitimate motives, its verdict should be that the employer discriminated against her "because of" her sex.[3/] The holding of

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[3/] The relevant part of the instruction is:

"You have heard evidence that the defendant's treatment of plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the

Desert Palace should apply to the ADEA because the age Act's prohibitory language, "derived *in haec verba*" from Title VII, *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), provides that it is an unlawful employment practice "for an employer ... to ... discriminate against any individual ... *because of* such individual's" age. 29 U.S.C. § 621(a)(1) [emphasis added]. *See Smith v. City of Jackson, Mississippi, et al.*, 544 U.S. 228, 236 (2005) (holding that the ADEA authorizes recovery for disparate impact claims, in part because "*Griggs* [*v. Duke Power Co.*, 401 U.S. 424 (1971)], which interpreted the identical [Title VII] text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA."); *accord, e.g., Norcross v. Memphis Bd. Of Educ.*, 412 U.S. 427, 428 (1973) ("The similarity in language ... is, of course, a strong indication that the two statutes should be interpreted *pari passu*.").

The legislative history of the CRA supports this conclusion:

> [A] number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, are modeled after, and have been interpreted in a manner consistent with, Title VII. The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act.

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defendant's conduct was also motivated by a lawful reason." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 96 (2003).

H.R. Rep. 102-40 pt. 2, at 4 (1991).

The CRA amended Title VII, but not the ADEA,[4] to clarify and ameliorate the result of Price *Waterhouse*[5] in two new statutory sections, neither of which affects how the plaintiff proves his/her case. First, new section 42 U.S.C. § 2000e-2 (m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Second, new section 42 U.S.C. § 2000e-5 (g)(2)(B) provides that if "an individual proves a violation under section 2000e-2 (m)," the employer has only a limited affirmative defense that, contrary to the result of *Price Waterhouse*, does not absolve it of liability, but restricts the remedies available to the plaintiff. Thus, the fact that these changes were not amended into the ADEA does not even suggest that the direct evidence requirement that was implicitly rejected a majority of the justices in *Price Waterhouse* should be imposed in ADEA mixed motive cases.

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[4] *See* Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 Berkeley J. EMP. & LAB. L. 217, 264-265 (2007) (discussing the CRA amendment of Title VII, but not the ADEA, regarding disparate impact claims): "To expect that Congress would head off what , at the time, was a mere conjecture that Wards Cove [*Packing Co. v. Antonio*, 490 U.S. 642 (1989)] would be applied to the ADEA is to ask too much of Congress. That is particularly true considering that the interest groups most concerned with the fate of the ADEA felt no immediate motivation to lobby for a similar amendment to the ADEA."

[5] "[T]he Act responds to Price Waterhouse by reaffirming that any reliance on prejudice in making employment decisions is illegal." H.R. Rep. 102-40 pt. 2, at 2 (1991).

Legislative restraint provides another plausible explanation for the CRA's failure to include the ADEA in the *Price Waterhouse* amendments. Specifically, "[t]he 1991 amendments responded to several Supreme Court opinions which arguably hurt Title VII plaintiffs. There was no comparable judicial assault on the ADEA ...." *Camacho v. Sears Roebuck*, 939 F. Supp. 113, 120 (D.P.R. 1996). In such circumstances, the Court has "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *NLRB v. Plasterers' Local Union No 79*, 404 U.S. 116, 129-30 (1971) quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993), quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."). *See also Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 629 (1987) (Scalia, J., dissenting) ("*any* reliance on congressional failure to act is necessarily a 'canard.'") (emphasis in original).

Title VII as amended by the CRA "does not mention, much less require, that a plaintiff make a heightened showing through direct evidence." *Desert Palace*, 539 U.S. at 98-99. The CRA itself does not mention or even refer to direct evidence. If Congress intended to require "direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect" in the CRA amendments to Title VII and by applying such amending language to the ADEA and the other federal work place civil rights statutes. *Id.* at 99. Congress' "failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title" VII. *Id.* The Court also found significant the statutory "silence with respect to the type of evidence required in mixed motive cases" which "suggests that we should not depart from the conventional rule of civil litigation that generally

applies in [employment discrimination] cases," ... which "requires a plaintiff to prove his case by a preponderance of the evidence using direct or circumstantial evidence." *Id.* (internal citations and quotation marks omitted). One year after the Court's decision in *Desert Palace* rejecting the direct evidence requirement for Title VII mixed motive cases, the Fifth Circuit relied on the reasoning of that decision to similarly reject it in an ADEA case:

> Given that the language of the relevant provision of the ADEA is similarly silent as the heightened direct evidence standard, and the presence of heightened pleading requirements in other statutes, we hold that direct evidence of discrimination is not necessary to receive a mixed motive analysis for an ADEA claim.

Rachid v. Jack In The Box, Inc., 376 F.3d 305, 311 (5th Cir. 2004); *see Strauch v. Am. College of Surgeons*, 301 F.Supp.2d 839, 844 (N.D.Ill. 2004), cited in *Rachid*, 376 F.3d at 311:

> "Given the similarities in text and purpose between Title VII and the ADEA, as well as the consistent trend of transferring the various proof methods and their accompanying rules from one statute to the other, this Court considers it likely that whatever doctrinal changes emerge as a result of *Desert Palace* in the Title VII context will be found equally applicable in the ADEA arena.

These sound reasons for not engrafting a direct evidence requirement onto Title VII apply with equal force to the ADEA and the other federal work place civil rights statutes, all of which are silent as to a heightened proof standard.

II. IT WOULD BE UNFAIR AND UNJUST TO IMPOSE A DIFFERENT PROOF STANDARD FOR THE SAME KIND OF CLAIM UNDER TITLE VII AND THE ADEA, GIVEN THE IDENTITY OF PROHIBITORY LANGUAGE AND PURPOSE OF THE TWO STATUTES.

As discussed above, the Court in *Desert Palace* held that the plaintiff in a Title VII mixed motive case is not required to provide direct evidence of discrimination in order to shift the burden of proof to defendant. This holding was based in part on statutory language that Congress enacted word for word into the ADEA. The identity of this language in the two statutes coupled with Congress' identical purpose in enacting them, as well as their synergistic effect in deterring and remedying work place discrimination also argue that the same standard of proof should be applied to the same kinds of claims under both statutes.

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995), the Court declared:

> The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide.

The Court pointedly stated:

> The ADEA and Title VII share common substantive features and also a common purpose: the elimination of discrimination in the workplace.

Id. at 358 (internal citations and quotation marks omitted).

The Court then elaborated on the purposes of the two statutes:

> Congress designed the remedial measures in these statutes to serve as a spur or catalyst to cause employers to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of discrimination. Deterrence is one object of these statutes. Compensation for injuries caused by the prohibited discrimination another.

Id. (internal citations and quotation marks omitted). Since these conclusions are also generally applicable to the other federal work place civil rights statutes that will be affected by the Court's decision in this case, it would disserve all mixed motive claimants under these laws to impose on them a different and higher proof standard than that applicable to Title VII.

CONCLUSION

There are no compelling reasons to impose on ADEA mixed motive claimants a different and more onerous evidentiary burden than that applicable to such claimants under Title VII. The relevant language and purposes of Title VII and the ADEA are identical and there is no indication of congressional intent to differentiate between Title VII and the ADEA or the other federal antidiscrimination statutes when it comes to such claims. The Court should reject the direct evidence requirement for ADEA mixed motive claims for the same reasons it has done so for Title VII mixed motive claims. To do otherwise would proclaim that age discrimination, disability discrimination, and the other forms of discrimination prohibited by the

non-Title VII federal legislation are less onerous, less invidious, and, therefore, less deserving of societal condemnation than those grounds enumerated in Title VII. The Court should, therefore, hold that the plaintiff in an ADEA mixed motive case need not provide direct evidence of discrimination in order to shift the burden of proof to the defendant.

February 2, 2009

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